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Big Love:¹ Is Feminist Polygamy an Oxymoron or a True Possibility?

*Michèle Alexandre**

I. INTRODUCTION

As for ourselves, we have been deserving, and our sisters-in-law sing a chorus of praises chanted at the top of their voices. Our patience before all trials, the frequency of our gifts find their justification and reward today. Our sisters-in-law give equal consideration to thirty years and five years of married life. With the same ease and the same words, they celebrate twelve maternities and three.²

For the past few decades, Islamic reformists have attempted to reverse patriarchal set-ups in Islamic practices. In light of these efforts, the time is ripe to consider what role women's agency will play in the implementation of such reforms. The way we account for agency in advocating for

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1. This term is borrowed from HBO's new series about a polygamous family involving one man and three wives with three different households. HBO: Big Love – About the Show, <http://www.hbo.com/biglove/about/index.html> (last visited Aug. 29, 2006)

2. MIRIAMA BÂ, SO LONG A LETTER 4 (Modupé Bodé-Thomas trans., Heinemann 1981) (the narrator, Ramatoulaye, recounts the treatment she and her co-wife received from her sisters-in-law at the death of her husband).

women's rights is an issue with which feminist legal scholars struggle.³ It has been explored particularly when analyzing women's rights in the area of pornography and prostitution. As the reform movements in Islamic law become concrete, similar explorations will have to take place. Agency-driven explorations in the area of Islamic law will have to be tailored to issues of particular relevance to Islamic women. In addition, feminist legal scholars will have to take care not to project a western-based analysis onto unique Islamic settings. Borrowing from transformative arguments advocated by feminist legal scholars like Martha A. Fineman,⁴ the article explores the implications of recognizing the possibility for agency in Islamic polygamous structures. The central idea is to analyze the possibility of a feminist based form of polygamy for women who decide to live in a polygamous structure. This exploration in no way assumes that Muslim women are solely defined by their religion. On the contrary, it recognizes that women's identities are so diverse that, even when given options, a number of them might opt for polygamy rather than monogamy. In this context, an assessment of the value of monogamy compared to polygamy is irrelevant. What matters instead is the fact that women who choose polygamy, like those who make any other legitimate choice, must be protected.

Consider the following scenario: an Islamic woman who has been married for 25 years suddenly learns that her husband recently married a second wife. Imagine the pain, distress, and sense of betrayal that this woman feels upon learning such news. Furthermore, imagine the pragmatic decisions that this woman must face: To stay or not to stay? If she stays, what will her life as a co-wife be like? How many times a week will she see her husband? If the co-wives live in the same house, how will the domestic tasks and the familial and financial responsibilities be distributed? As depicted in the seminal work, *So Long a Letter*,⁵ women in Islamic polygamist communities routinely grapple with these questions. The aforementioned scenario is but one of the many situations that might motivate a woman's decision to live in a polygamous union. Regardless of the reason, the reality is that in the wake of Islamic reform movements a number of women might still opt for the controversial institution of polygamy.

Polygamy is a system that is generally viewed as oppressive and degrading for women. When Islam or polygamy is evoked, one of the most

3. See generally *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* (Priscilla Alexander & Frédérique Delacoste eds., Cleis Press 1987); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1, 1-29 (1985); GAIL PHETERSON, *A VINDICATION OF THE RIGHTS OF WHORES 1* (The Seal Press 1989).

4. MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES* (Routledge 1995).

5. BÂ, *supra* note 2.

common reactions is disapproval, or to view these institutions as primitive or unenlightened. Such dispositions, however, evade the real issue of how to best protect the women who either choose or accept a polygamous lifestyle. This article invokes the concept of cultural feminism⁶ to advocate for both the acceptance of women's choices and the protection of Muslim women who choose to live in polygamy. While the context of polygamy is a slight departure from the original notion of cultural feminism, which juxtaposes men and women, cultural feminism can still serve as a good paradigm for understanding the motivations, realities, and desires of women living in polygamous unions.

The rising number of pro-polygamous movements⁷ indicates that it is imperative that we investigate the possibilities for a women-centric polygamy.⁸ Islamic women have diverse views regarding polygamy; not all view it as detrimental.⁹ Muslim women exist who are unequivocally against polygamy, but want to remain faithful to Islam. There are others who are not against polygamy but would prefer to reform the practice to fit their needs. The common denominator between these two groups of women is that they all yearn to have more choice and control over the decisions that affect their family life. In their eyes, the desire to enter or remain in a polygamous union does not necessarily equate with a diminishment of their rights and privileges. For many Islamic women the desire for autonomy and equal rights is often coexistent with their commitment to Islam; a combination that, according to popular stereotypes of Islam, creates an untenable conflict. This Article intends to show that

6. Cultural feminism is generally "an approach that seeks to improve the position of women in the profession through legal and social strategies which validate women's differences from men." WOMEN AND THE LAW 57 (Judith G. Greenberg, Martha L. Minow & Dorothy E. Roberts eds., 2d ed. 1998). Cultural feminism is often associated with scholars such as Carol Gilligan.

7. See Pro-polygamy.com, 'Polygamy Rights' Movement Not Re-Defined by Homosexuals, Mar. 31, 2006, available at <http://www.pro-polygamy.com/articles.php?news=0040> (last visited Nov. 6, 2006) (discussion of pro-polygamy movements in the United States. In addition, there has been recent media coverage, on CNN's Anderson Cooper 360 and Larry King Live for example, showcasing pro-polygamy women advocating for their rights to live the polygamous lifestyle).

8. See Mariam Fam, *Egyptians Divided Over Polygamy Proposal*, LEXINGTON HERALD-LEADER, Aug. 29, 2005, at A4 (account of Ms. Hyam Dorbek, a 42-year-old journalist, caused quite a stir advocating that Egyptian women and the "rest of the Arab world [should be] more open to [p]olygamy as approved by Islam.").

9. See Shagufta Yaqub, *Private Wives: This Week's Tale of a Man with Three Wives Might Have Shocked Many. But Polygamy Can Sometimes Work Very Well, Says Shagufta Yaqub*, THE GUARDIAN (UK), Aug. 12, 2005, at 6. Journalist Shagufta Yaqub concluded from her research that "[p]olygamy can sometimes work very well." She continued by stating that "one of the women I spoke to believed that she was far better off being a second wife than a mistress." Another stated that she liked the system because: "there were no secrets involved and no infidelity." These testimonies, while presenting a subjective and perhaps slanted view of polygamy, reveal that women exist who would choose polygamy if they deem it beneficial to their needs.

equal rights for women and the Islamic faith are not necessarily mutually exclusive if the allocation of rights is based on the spirit of Islam. Furthermore, the Article will demonstrate that Islam's inherent concern with justice and equality for women requires that women's desires and wishes serve as a foundation for any system of polygamy.¹⁰ Reconciling Islamic law with the spirit of Islam mandates a renunciation of the misconceptions about Islamic law, a consideration of the historical context in which Islam was born and a construction of a women-centric interpretation of Islamic law.

This Article will also analyze women's narratives and Islamic jurisprudence to investigate the potential for a women-centric Islamic reformation. The following questions will be explored to determine whether the system of polygamy itself can be reformed to be women-centric: What is the goal of polygamy? What role do women play within this system? What do the sacred texts of Islam say about polygamy? How is polygamy implemented? Is polygamy's implementation consistent with the Islamic sacred texts? How does the practice of polygamy in Muslim states compare to its practice in non-Muslim states? This exploration is divided into four parts. The first part is a study of classical Islamic law's treatment of women. The second analyzes women's practice of polygamy as revealed by their narratives in order to determine its effects on women's lives. The third focuses on alternate interpretations of the Islamic texts and offers some ideas of possible reforms. The final part investigates possibilities of coalition building between Muslim and non-Muslim women.

II. TRADITIONAL ISLAMIC LAW'S TREATMENT OF WOMEN

For women in polygamous unions, remaining true to Islam and advocating for more rights is a difficult balancing act. The ambivalence stems from the patriarchal interpretations of Islam that have now become law in many Islamic jurisdictions. Determining one's stance on polygamy is a task faced by many Islamic women of various social echelons. Reporting on Muslim journalist Shagufta Yaqub's deliberations about whether or not she would agree to a polygamous union, a British reporter marveled at the extent of her ambiguity toward polygamy. He reported:

I was startled to hear [journalist Shagufta Yaqub] saying on Radio

10. The scope of this article is limited to Islamic polygamy because the complexity of Islamic law necessitates a separate treatment from the practice of polygamy in other settings. Additionally, polygamous practices and manifestations are so tightly connected to their respective legal system that each polygamous setting ideally deserves separate treatment.

Four, that when she got married, she insisted on the right to continue her education and to initiate a divorce, but “the question of polygamy was more difficult to resolve. Should I insist that my husband never take another wife? In the end, I decided to leave the possibility open. If God has allowed polygamy I thought who am I to challenge it?”¹¹

Azizah al-Hibri understands this dilemma and confirms that the challenge for many Muslims is to determine how “to introduce progress into their society, while at the same time protecting their deep-seated spiritual beliefs and cultural identities.”¹² Advocating for equal rights is particularly challenging in the context of Islam because, although Islam regulates all aspects of Muslims’ lives, its jurisprudence has generally not yet been reformed to address the issues specific to modern society. Furthermore, “while many secular feminists have criticized patriarchal religiously-justified laws in Muslim countries, many Muslim women have defended Islam as the *guarantor par excellence* of women’s rights.”¹³ This broad gap among women was partly explained by some as the result of miscommunication.¹⁴ It is important to keep in mind that most Muslim women tend to be highly religious and would not want to act in contradiction to their faith.¹⁵ Reluctance to enter into polygamy and a desire to remain true to Islam can be reconciled through a women-centric interpretation of Islam. To formulate such an interpretation, it is crucial to understand the foundations of Islamic jurisprudence.

Islam’s set of guidelines for living is contained in the Shari’a. The Shari’a is considered to be a moral, ethical and spiritual guide for Muslims to follow. It is believed to be divine law. The Shari’a contains three sources: the Qur’an, the Sunna and the Ijima. The Qur’an, which is believed to be the direct revelations of God to the Prophet Muhammad, is the primary source of law.¹⁶ The Sunna is the model of behavior from the life of the Prophet Muhammad himself. The third source, consisting of the living tradition of the Prophet Muhammad’s companions and succeeding generations, is called consensus or Ijima.¹⁷ The Qur’an, considered the

11. Michael Vestey, *Islam and Polygamy*, THE SPECTATOR (UK), Oct. 23, 2004, at 68 (quoting Shagufta Yaqub on her ambivalence about polygamy).

12. Azizah Y. al-Hibri, *Muslim Women’s Rights in the Global Village: Challenges and Opportunities*, 15 J.L. & Religion 37, 39 (2001) [hereinafter al-Hibri, *Muslim Women’s Rights*].

13. Azizah Y. al-Hibri, *Islam, Law and Custom: Redefining Muslim Women’s Rights* 12 AM. U. J. INT’L L. & POL’Y 1, 1-2 (1997) [hereinafter al-Hibri, *Islam, Law and Custom*].

14. *Id.* at 2.

15. *Id.* at 3.

16. Azizah Y. al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT’L L. 1, 3 (1992) [hereinafter al-Hibri, *Islamic Constitutionalism*].

17. See e.g., al-Hibri, *Muslim Women’s Rights*, *supra* note 12, at 44; al-Hibri, *Islam, Law and Custom*, *supra* note 13; al-Hibri, *Islamic Constitutionalism*, *supra* note 16.

absolute authority in Islam, does not, however, provide solutions to all legal problems. Interestingly, "Islam has no clergy nor does it have an ecclesiastic structure."¹⁸ The Qur'an's content transcended the customs of the time and came to represent a code of law for Muslims. The Prophet Muhammad, however, still felt the need to provide additional guidance. Thus, in his lifetime the Prophet played the role of interpreter of the general provisions of the Qur'an. His interpretations and other details are assembled in a body of text called the Sunna. In Islamic theology:

The Arabic verb Sanna means to fashion a thing and produce it as a model Such exemplary conduct can either be initiated by setting an example or be drawn from the practice of the forefathers of, say, a tribe or community. As explained by Fazlur Rahman, the concept has two elements: an alleged historical fact of conduct and its normativeness for succeeding generations. In the Muslim context, the concept is explained by another scholar as follows: 'Among the pious successors of Muhammad and in the oldest Muslim community sunna came to mean anything that could be proven to have been the practice of the Prophet and his oldest disciples. Just as the pagan Arab adhered to the sunna of his ancestors, so was the Muslim community enjoined to uphold and follow the new sunna. Thus the Muslim concept of sunna is a variant of an ancient Arab concept.'¹⁹

Before the second century, there existed no precise manner in which to record these sayings. Consequently, a great deal of unreliable material was mixed in with authentic reports until scholars began a critical investigation of Traditions. There are conflicting views as to whether the Prophet Muhammad approved of Traditions being recorded in writing. Nonetheless, there is a general consensus that the Prophet Muhammad stressed that the Qur'an should be the most important source of law. For many scholars, the characterization of the Qur'an as a source of law means that the "primary purpose of the Qur'an is to regulate not the relationship of man with his fellows but his relationship with his creator."²⁰ Prophet Muhammad stressed very early the importance of using one's judgment and reasoning when resolving issues.

Ijtihad, which "literally means hard striving and strenuousness, but

18. See e.g., al-Hibri, *Islam, Law and Custom*, *supra* note 13; al-Hibri, *Islamic Constitutionalism*, *supra* note 16. See also, al-Hibri, *Muslim Women's Rights*, *supra* note 12, at 44 n.36 (for a discussion of how the Muslim governments often appoint Imans or the Grand Mufti for specific purposes).

19. ABDULAH AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW* 21 (Syracuse University Press 1990) [hereinafter AN-NA'IM].

20. *Id.* at 20.

technically it means exercising independent juristic reasoning,”²¹ is an important element of Islamic law. In Islamic legal terminology, it means: “to exert with a view to form an independent judgment on a legal question.”²² The use of judgment is celebrated in Islam. Ijtihad “is based on the rule of logic as well as on religious text. Each individual has direct access to the Qur’an and the Hadith and, in principle, entitled to engage in Ijtihad, so long as she has the requisite knowledge.”²³ Ijtihad’s importance is stressed in the Qur’an in verses such as 7:179, 8:22, 25:44, and 29:69.²⁴ The need for the exercise of “judgment” in decision-making became more pressing after the demise of the Prophet Muhammad as more regions were being converted to Islam.²⁵ As Islam evolved, decision-making power was delegated to more followers and the custom of interpreting the Qur’an and Traditions became more widespread. Unfortunately, as different schools of thought arose in Islam, a movement began towards a more rigid application of the law. Fear of Islam’s annihilation pushed the jurists to promote a strict, uniform way of life. With the strict application of law came a move away from justice and equality and an increase in emphasis on preserving the status quo. Consequently, earlier jurists began to “incorporate into their logic patriarchal assumptions not present in the Qur’anic verse itself, such as the assumption that women are emotional and irrational.”²⁶

Ijtihad is one of the many proofs that the basis for Islamic jurisprudence is one of fairness and justice rather than repression and injustice.²⁷ Ijtihad requires that each Muslim use his or her judgment to

21. AN-NA’IM, *supra* note 19, at 20.

22. *Id.*

23. al-Hibri, *Muslim Women’s Rights*, *supra* note 12, at 44.

24. THE QUR’AN 117, 121, 251, 281 (Abdullah Yusuf Ali trans., Asir Media 2002). Verse 7:179 states: “Many are the [j]inns and [m]en [we] have made for Hell. They have hearts wherewith they understand not, eyes wherewith they see not, and ears wherewith they hear not. They are like cattle, nay, more misguided because they are heedless . . .” *Id.* at 117. Verse 8:22 warns: “For the worst of beasts in the sight of Allah are the deaf and the dumb, those who do not understand.” *Id.* at 121. Verse 25:44 reveals the frustration at people who do not try to use their judgment to understand: “Or do you think that most of them listen or understand? They are only like cattle, nay, they are worse astray in [p]ath.” *Id.* at 251. Finally, verse 29:69 emphasizes the reward for doing your best to understand: “And those who strive in [o]ur (cause), [w]e will certainly guide them to our [p]aths, for verily Allah is with those who do right.” *Id.* at 281.

25. See AN-NA’IM, *supra* note 19, at 27 (stating: “[I]t is hard to imagine any text of the Qur’an or Sunna, however clear and definite it may appear to be that does not require . . . ijtihad for its interpretation and application in concrete situations. In this way, it would seem clear that ijtihad was a fundamental and very active concept during the eighth and ninth centuries A.D.”).

26. al-Hibri, *Muslim Women’s Rights*, *supra* note 12, at 45.

27. See Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, 15 J.L. & Religion 185, 193 (2000-2001) [hereinafter Moosa, *Dilemma of Islamic Rights*] (stating: “the rationales underpinning Islamic [r]ights may be derived from reason, a divine order and public interests”).

analyze and evaluate the verses of the Qur'an for himself or herself and adhere to a way of life consistent with his or her interpretation. It is interesting that a religion which is often described as extremist would have such an autonomous foundation. The presence of Ijtihad in Islamic jurisprudence also indicates that it is possible for Islamic reforms to remain consistent with the spirit of Islam while championing a fair application of the law. Modern Muslim women have begun to prove that very fact through grass roots activism around the world. For example, Azra Nomani described a group of women who attended a conference on Islamic feminism in the following manner:

To many, we are the bad girls of Islam. But we are not anti-sharia (Islamic law) or anti-Islam. We use the fundamentals of Islamic thinking — the Qur'an, the Sunnah, or Traditions and sayings of the Prophet Muhammad, and *ijtihad*, or independent reasoning — to challenge the ways in which Islam has been distorted by sharia rulings issued mostly by ultraconservative men.²⁸

Within Ijtihad, there exists various methods used for problem solving. These include Quiyas (reasoning by analogy), Istihsan (juristic preference) and Istidal (logic or reason). These would be great tools to construct innovative decision-making. Unfortunately, a number of Muslims believe the gates of Ijtihad have remained closed since the tenth century.

Ijima, or consensus, is defined as an agreement between the jurists who were the followers of Muhammad on a certain question of law. Different opinions exist within the schools as to what constitutes a consensus. Some believe that Ijima is confined to the companions of Muhammad. Others believe that it extends to the companions' successors as well. It is also in dispute what exactly constitutes an effective law. Some schools believe that once a consensus is reached on a specific question of law, it is not to be re-opened unless a jurist of the same era had a different opinion. Other schools believe that Ijima consisted of the opinion of the first four Caliphs. No matter what, it would appear that Ijima requires Ijtihad in order to grow and develop. This is where one encounters resistance. Since conservative Muslims consider the doors to Ijtihad to be closed, they restrain from advocating its use in any law-making. As a consequence, the Shari'a has been stagnant for centuries. According to experts:

[The] process of Islamization involved the adoption and adaptation of pre-Islamic norms and institutions of both Arab and non-Arab segments of the Muslim population. The process of Islamization

28. See Asra Nomani, *A Gender Jihad For Islam's Future*, THE WASHINGTON POST, Nov. 6, 2005, at B2.

was slow and protracted because it was limited by the methods of transportation, communication, and other technological resources of the seventh and eighth centuries. Nevertheless, it was a thorough and effective process that set the scene for the development of Shari'a and the arts and sciences of the Islamic civilization over the next several centuries.²⁹

Islam, a once evolving jurisprudence, has been stifled because of the reluctance to use Ijtihad. Hence, according to Islamic experts, Shari'a has not evolved much since its peak in the eighth and ninth centuries. This stagnant state is limiting because it has not taken into account the evolution of time and thus, has not adapted accordingly.

Considering the relatively progressive nature of the Qur'an, the primary source of Islamic law, it is deplorable that Islamic law has been constrained by international and patriarchal biases. As stated by Ebrahim Moosa "from its very inception in seventh century Arabia, the message of Islam demonstrated a preoccupation with the social, moral and spiritual condition of human beings."³⁰ It is of particular interest, however, that despite its limitations, some passages of the Qur'an were viewed as more progressive than the customs existing at the time of Islam's inception. The Qur'an and the Sunna contain a paradigm of equality that is counter to the notions that have been implemented by Islamic traditionalists. The protection of women and respect for women are mantras that are present throughout the Qur'an. For example, the Qur'anic creation story is one that does not place blame on the woman alone, but rather states that the man and woman were tempted by Satan.³¹ In addition, in the creation story, the woman is not created out of the man's rib. Ironically, it is in great part this concern for the well-being of women that originally justified the maintenance of polygamy in Islam. Traditional Islamic scholars have not given as much weight to this notion of equality of the sexes in their interpretations of the Shari'a. This is explained by the fact that Islamic mandates, when created, were in great part a response to the ailments and conditions existing at the time. It is thus crucial to understand that:

The legislative approach to independent reasoning (al-ijtihad al-tashri'i) assumes that sufficient consideration and weight be given to changing conditions and their concomitants in the search for legal solutions. Especially the conditions of this age in which we

29. AN-NA'IM, *supra* note 19, at 14-15.

30. Moosa, *Dilemma of Islamic Law*, *supra* note 27, at 187.

31. THE HOLY QUR'AN 186 (4:1), 299 (6:98), 359 (7:189), 778 (30:21) (Maulana Muhammad Ali trans., Ahmadiyyah Anjuman Isha'at Islam Lahore, Inc. 1995); *see also* al-Hibri, *Muslim Women's Rights*, *supra* note 12, at 46 (stating that the Qur'an describes all human beings as having been created from the same "nafs").

live, in particular its complexity, requires diverse scientific specialties in accordance with the nature of the circumstances, in order to generate new analyses and explanations. For [these circumstances] provide new indexes of moral obligation (*adilla taklifiyya*) that require new rules of legal reasoning and activity (*ahkam ijtihadiyya*). Hence, jurisprudence must relate to reality, with its changing circumstances and accompanying phenomena. [Jurisprudence] should be contemplated in such a manner that it affirms its own existence, and also avoids the causes of its weakening, incoherence and collapse.³²

Re-popularizing the use of *Ijtihad* to address societal injustices is crucial to furthering a women-centric Islamic reform. Moosa also contends that:

The rationales underpinning Islamic rights may be derived from reason, a divine order and public interests. The latter category [is] essentially the policy objectives of the revealed law . . . that jurists take into consideration when developing the law. These goals that the *shari'a* advances are the protection of religion, life, progeny, intellect and wealth.³³

Unfortunately, Islamic jurists have not followed this mandate and have, instead, championed a limited application of Islamic law for centuries. Generally, traditional jurists have refused to apply *Ijtihad* to reconcile the changing conditions of women and Islamic precepts. Scholars of Islamic law, such as Azizah al-Hibri and Abdulah Ahmed An-Na'im, have long denounced the inherent problems present in the modern-day application of *Shari'a*. Abdulah Ahmed An-Na'im's *Towards an Islamic Reformation* challenges historical *Shari'a* and proposes that Muslims re-evaluate *Shari'a* in a way that allows it to be consistent with constitutional and human rights. An-Na'im believes that there is a way of maintaining a balance between legitimacy of the law and progressivism.

This balance is very delicate because "attributing inadequacy" to a rule in Islam is a sensitive subject. Muslims consider *Shari'a* to be a set of mandates obtained directly from God. An-Na'im, however, seems to believe that Islamic law has always been a matter of interpretation:

Stages of Muslim history reflected continuous fluctuation between greater and lesser observance of *Shari'a* in practice. . . . Although *Shari'a* professes to be a single whole, there is significant diversity

32. Ebrahim Moosa, *The Poetics and Politics of Law after Empire: Reading Women's Rights in the Contestations of Law*, 1 UCLA J. ISLAMIC & NEAR E.L. 1, 4 [hereinafter Moosa, *Poetics and Politics*].

33. Moosa, *Dilemma of Islamic Law*, *supra* note 27, at 193.

of opinion not only between the schools but also between jurists of the same school. . . . Because all the divergent and sometimes conflicting views are regarded as equally valid and legitimate, any Muslim has the choice of taking whatever view is acceptable to his or her individual conscience.³⁴

Consequently, an Islamic reform movement should build on this interpretative history and promote an educational component designed to educate the public as to the relationship between historical context and religious dogma. Only with such a deliberate educational effort might we begin to erode the patriarchal steadfastness of archaic Islamic interpretations.

Numerous examples can serve to illustrate how the Shari'a's patriarchal interpretations present oppressive, nefarious consequences for women. The Shari'a's penal code thoroughly discriminates against women. For example, monetary compensation paid to surviving blood relatives of a murdered female is less than that paid for the killing of a male. Additionally, some scholars believe that women lack the capacity to contract. Lastly, Muslim men are often granted the right to give a "talaq"³⁵ for any reason while women have to undergo lengthy procedures to divorce their husbands. These few examples make painfully clear the fact that the Islamic texts have been interpreted in a gender-biased fashion. These oppressive applications of the sacred texts have deviated from the spirit of change and progress with which Islam was created.

III. WOMEN'S NARRATIVES OF THEIR EXPERIENCE OF LIFE IN POLYGAMY

Muslim women have voiced their discontent in fictional literature (e.g., Miriama Bâ's *So Long a Letter*) as well as in written sociological studies done on the institution of polygamy. In *La Femme De Mon Mari*³⁶ by Sylvie Faizang and Odile Jounet, women's individual narratives make it clear that, while they resign themselves to polygamy, they do not like it. This is the reason women try to adopt the protection of a monogamous contract as soon as they are able to do so. In America, many Muslim women, at the onset, chose to signify to their husbands that polygamy is not an option and that if they ever chose to violate their contract, they will

34. AN-NA'IM, *supra* note 19, at 33.

35. A "Talaq" is often described as a word uttered three times by men in order to divorce a wife. See also Moosa, *Poetics and Politics*, *supra* note 32, at 30; see also FEMINISTS AND ISLAM, LEGAL AND LITERARY PERSPECTIVES 259 (Mai Yamani ed., New York University Press 1996).

36. SYLVIE FAIZANG & ODILE JOUNET, *LA FEMME DE MON MARI: ETUDE ETHNOLOGIQUE DU MARIAGE POLYGAMIQUE EN FRANCE* (L'Harmattan 1988).

divorce them. Felicia,³⁷ a young Muslim woman who grew up in a Muslim community in the United States, recently described the uproar that arose in her community when a number of the men decided to take second wives. Her account shows that while some women resign themselves or willingly accept polygamy, there is a strong resistance to polygamy among women. As women move to the urban areas where polygamy is less practical and more expensive, this resistance becomes more evident. In the rural areas, polygamous families often live in large houses where each co-wife and her children have an independent space of their own. As they move to the city, polygamy becomes less practical because the man has to keep each wife in a separate house, incurring much more expense.

When Muslims move to non-Muslim states, the situation is even more strained. The husband shares a small space with his wives and children. Everyone suffers from a lack of privacy, and the rivalry between the co-wives is exacerbated. Alternatively, a more established husband might separate his families into individual households. The result of this set-up is that each family only spends a limited amount of time with the husband. This situation often creates unhappiness and resentment. Consequently, as Muslim women become more self-sufficient, they begin to rebel against the system. The fact that they often migrate to countries that do not condone polygamy, like the United States or France, also contributes to this change in women's attitudes.

A great number of arguments are constantly put forth to justify the maintenance of polygamy. While these justifications are provided mostly by men, a number of women have begun to champion them as well. The first justification is that polygamy serves as a way of protecting women and making sure they do not turn to prostitution or become completely destitute. The second justification states that polygamy allows for the creation of a large number of workers that make familial duties more efficient and economical. The assumption here is that sexual relations with more than one woman increases the man's ability to procreate. In other words, the more wives and children, the cheaper the workforce. Finally, it is argued that polygamy is a way to remedy a man's sexual frustrations when women are seen as unable to participate in sexual relations, such as when they are menstruating or breastfeeding.

None of these justifications, however, place the needs of Muslim women at the center. On the contrary, the primary concern seems to be with the men's convenience at the expense of women. In addition, polygamy fosters an unhealthy competition between women. Many texts refer to the fact that men maintain their dominion by fostering rivalry between co-wives. In Miriama Bâ's fictional works, for example, the young co-wife, being insecure about her situation, forbade her husband to

37. All names have been changed in order to maintain the individuals' privacy.

visit his first wife.³⁸ In this instance, the taking of a co-wife resulted in the complete devotion to the first one. The rivalry stems from the desire of each wife to be the preferred wife.³⁹ According to the narratives extracted from Faizang and Jounet's study in Senegal, the arrival of a co-wife is often a painful experience.⁴⁰ Sexual competitions often occur among the women vying for the polygamous husband's attention.⁴¹ According to Islamic law, each wife has to wait her turn to share her husband's bed. Depending on the number of wives, a woman's turn may come up two or three times a week. Only in the first week of marriage to a woman is the husband allowed to spend more than one night with her; he is allowed to spend seven nights with her if it is her first marriage and three if it is not.⁴² Otherwise, he must conform strictly to the system of turns.⁴³ If he fails to do so, the wife who is being neglected can leave her husband on the basis of unequal treatment. Unfortunately, many women do not take these measures for fear of public humiliation.⁴⁴

Instead, they might resign themselves to living in a tense atmosphere where all types of subterfuge are used to obtain the favors of the husband. The children also suffer from these rivalries because a co-wife often might be ill-disposed toward the children of a rival and might treat them in a harsh manner. A woman who is suspected of having slept with the husband out of turn will be labeled as a "night thief" and her child considered a "bastard."⁴⁵ Many of these disputes regarding turns happen at the occasion of a husband pretending to forget which wife he is scheduled to sleep with.

The situation becomes even more painful as the woman grows older.

There are husbands who completely abandon their wives when [they] get older. They do not even spend the night with them anymore. These wives are miserable but they do not say anything. If they have children they stay. They wait until the children grow up and are able to earn a living. Then they are happy.⁴⁶

38. BÂ, *supra* note 2.

39. FAIZANG, *supra* note 36, at 92-95.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 63. The authors describe examples of conjugal agreements reached between polygamist women that they studied. The regularity of conjugal visits vary from household to household, but seem to range from one to four days. For example, it seemed that 2 days/2 days was the most frequent combination in the urban households while the 1 day/1 day combination dominated in the rural ones. In the 1 day/1 day scenario, the husband would habitually drop his personal effects at sundown in the room of the spouse in question, spend the night and have access to her room until sundown the next day.

44. *Id.*

45. *Id.*

46. *Id.* at 37. The neglect of the older wives is also illustrated by the author's

A husband's neglect of his older wives is a common story that seems to disprove the rationale that polygamy is designed to protect the interests of women.

The threat of obtaining a second wife is often used by husbands as a blackmail device. Even the men who identify themselves as favorable to monogamy will trick their wives into signing a contract permitting polygamy. Some women explain that after having obtained the promise of a monogamous marriage, they find themselves obligated to sign a contract with the polygamous option on their wedding day. Pressured by their family and afraid of a scandal, they sign the contract reluctantly.⁴⁷

Women feel that if they marry under a monogamist system, they are freer to speak their minds without fear of displeasing their husband. Ironically, that is one of the reasons men prefer marrying under a polygamist regime. Under a polygamist system, the husband can always threaten to take a second wife if the current wife disobeys. Thus, a monogamist contract is never guaranteed. Many women find themselves with a co-wife even after insisting on a monogamist contract. On that occasion, the wife's only option is to divorce her husband or resign herself to the situation. In addition, in countries like Senegal, the monogamist contract is temporary because it can be revised every seven or eight years.

While the dynamics of a polygamist family are challenged when the family moves to non-Muslim soil, coping mechanisms are developed to maintain the same family structure as in the motherland. Spatial and financial issues are the main challenges that polygamist families face. The modifications engendered in the daily life of polygamous families in the immigration context are enough to shake the foundations of the institution of polygamy.

The first challenge to polygamy lies in the fact that immigration often results in a shift of authority in the family. On foreign soil, women become more aware of the importance of education in order to attain financial independence. Women's education becomes necessary to the survival of the family. As it is often necessary for more than one person to work, women have to learn the language of their host country, thus opening themselves up to ways of life and mentalities that are different from their own. As they become more educated, they become more willing and apt to challenge the system of polygamy. In such situations, it becomes more

observation that most of the women to whom they spoke were young because their husbands, not able to keep all their wives in France because of financial reasons, would generally send back their older spouses to their native countries.

47. FAIZANG, *supra* note 36, at 55. The authors illustrate that the wives usually have no choice as to whether or not their husband will take a second wife. One husband candidly admits that, although he warned his first wife when he was planning to marry a second wife, he still would have married his second wife even if the first one had not agreed with his decision.

common for women to attempt means of contraception in order to pursue an education. Thus, their life is no longer limited to having a great number of children. However, the use of contraception is often against their husband's will. The value system also changes as women no longer measure their status by number of children or rank as first wife. Instead, the measure of success is based on the level of schooling and the degree of autonomy that one possesses.

The move to foreign soil often inverts the familial hierarchy. Often times, the wife that arrives first will be the one with the most authority in the immigrant family. The order of arrival in France, for example, does not always follow the order of marriage and often times the husband will send for his latest and youngest wife before the older ones. As a result, the older wives, once finally in France, find themselves in a position where they are dependent on the younger one who is more familiar with the language and the ins and outs of the foreign land. The wife who is more fluent in French and more educated will be the one making the most decisions, especially in financial and administrative matters. When the husband is absent, she might find herself in charge of the family and she also might be the one who receives the monthly social security pension awarded by the French government. This situation is a particularly frustrating one for the first wife who is robbed of all her means of valorization. As reproduction becomes less important than an education and financial independence, the first wife finds herself more prone to rebelling against the polygamist structure altogether. Although men try to maintain the same system when they move to a non-Muslim country, the changes that occur are inevitable. Nonetheless, for Muslim women who try to stay true to their religion, independence remains a distant concept when the jurisprudence does not openly ratify their search for better treatment. For women in a polygamous union the inequities resulting from the current constraints under Islamic law mandate that alternative methods addressing women's needs be implemented.

IV. CONSIDERATION OF REFORM PROPOSALS

A. ROLE OF ISLAMIC JURISPRUDENCE IN THE FORMULATION OF REFORM PROPOSALS

Despite the increasing presence of Islamic reform movements, traditional Islamic scholars have been quite opposed to the potential of reforms. The first objection stems from the belief held by many Muslims that Islamic law is divine. The first obstacle any reformer must surmount is that one should not follow Muslim texts literally. In circumventing this obstacle, one must show that the Qur'an stemmed from Muhammad's

desire to advance justice. An initial step would be to show that the Qur'an (the highest source of law in Islam) is solely the Prophet Muhammad's attempt at organizing a just and civil society. The Qur'an contains recommendations for living first and foremost; rarely does it deal with the possible consequences of any actions, or of disobedience of a law. The Qur'an was an answer to the problems of the time. Throughout his recommendations, the Prophet attempted to elevate human interactions to a level where people would take into account notions of justice and equality.⁴⁸

Any reformative attempt on polygamy must establish that the Qur'an is a set of recommendations for a more just society. While the spirit of the Qur'an is that of fairness, some of the details were influenced by their sociological circumstances. In the Qur'an, the Prophet was attempting to find solutions to the more immediate problems of his time. Among these problems were the deplorable conditions of women and the abuses they suffered. While one cannot act like the ostrich and purposely ignore the inequitable verses in the Qur'an, it would be unproductive to adopt them blindly without putting them into perspective. An-Na'im proposes the following reformation tactic in resolving this dilemma:

A new principle of interpretation has to be employed for polygamy to be legally restricted and for men and women to have absolute parity by law. This principle in my view is the evolutionary principle proposed by Ustadah Mahmoud. According to this principle, the exception under verse 4:129 was made to permit the practice of polygamy, which was necessary at that stage. In the historical context of Shari'a, women were dependent on their men for their security and economic well being. Since men were in short supply because of the ravages of war in the seventh century, it was better for a woman to share a husband with other co-wives than to remain a destitute and defenseless spinster. Similarly, the part of verse 2:228 to the effect that men have a degree of advantage over women has to be seen in historical context. Although that degree was reflected in the legal status of men and women in the previous context, it should have no legal consequences in the modern context.⁴⁹

This interpretation would help reconcile the tension existing in the Qur'an, as well as help promote equality of treatment between men and women.

First, in order to construct Islamic law that takes into account the constitutional rights of all its citizens, the rigid application of texts must

48. AN-NA'IM, *supra* note 19, at 19-20.

49. *Id.*

give way to understanding the circumstances that generated these texts and a development of systems that are more suited to the circumstances of the current times. By the same token, a just application of Islamic precepts should defer to the specific needs and desires of Muslim women.

Second, many modern Muslims try to justify these ancient laws by citing sociological and historical justifications for them. However, the acknowledgement of the role that these factors played in the making of the law should not stop us from evaluating its application with respect to changing times. If the laws are not re-evaluated and revised, Shari'a's inequalities will not be remedied. To those who prefer the old laws, it is important to remind them that: "although slavery may have been accepted as justifiable in the past no one would claim that it is now."⁵⁰ Thus, progressive Muslims should advocate for a way to reform Islamic law to include prevailing notions of fairness, justice, and reasonableness.

The third reason Muslims reject reforms is that they fear that such reform will undermine the legitimacy of Islamic law. While this fear is understandable, it should not consume us to the point of inaction. The first step of any reformation movement should be to examine the origins and sources of a law and determine whether the law still applies. Without departing from the foundations of Islam one can use techniques such as reasoning by analogy (Qiyas) and applying the use of judgment (Ijtihad) to insure the protection of women and advance the goal of equality espoused in the Qur'an. This process is similar to that used by the Prophet himself when formulating the precepts he deemed appropriate for a just society. In other words, one should judge a particular situation using Ijtihad (reasoning) and evaluate the context in which the situation arose to determine what the particular outcome should be. A profound concern for reaching the result that would be most just in light of changing times should be the guiding standard. Using this principle, Muslims will be able to remain consistent with the theological basis of Islam while, at the same time, reforming the unequal aspects of it.

It is possible that an analysis of Islamic law would lead us to the conclusion that Islam bans polygamy. Such a conclusion should not scare or alarm us as it is not contrary to the foundations of Islam. Judging from the Qur'an, it is clear that Islam's notions of fairness and justice touch and concern all aspects of life. Scholars have proposed that some of the verses in the Qur'an go so far as to abolish polygamy. These proposals stem from the contradictions that seem to exist between the verses. While on the one hand, verse Q.4:3 seems to present polygamy as being conditioned on one's ability to establish justice among co-wives, on the other hand, Q.4:129 states: "you will never be able to be fair and just between women (co-

50. AN-NA'IM, *supra* note 19, at 19-20.

wives), even if it is your ardent desire.”⁵¹ Q.4:129 continues on to say: “But do not turn away completely [from one of your wives] so as to leave her [as it were] hanging in the air. God is Oft-forgiving, Most Merciful.”⁵² The jurisprudential rule that each Islamic verse should be read in relation to the others is instrumental here. The Prophet, while accepting that polygamy could not be eradicated overnight, expressed serious doubts as to its practice in a just society. Verse Q.4:129 implies that polygamy can never render justice, and it seems that he challenges Islamic society to at least evaluate the system objectively. Thus, we see that this verse is more of an acceptance of man’s weakness and a recommendation that he do his best, rather than a condemnation of the system of polygamy.

In the verse commonly known as “Quarama” (Q.4:34), we see that man’s guardianship of women arises out of an obligation to take care of them. They are expected to use their resources to support women. In addition, verse Q.2:228 admits that women have rights equivalent to those of men, but still states that men have “a degree of [advantage over them].”⁵³ The tension between establishing justice for women and still allowing men’s dominion over them is present in a number of places in the Qur’an. Some scholars have dealt with these inconsistencies by emphasizing some parts of the Qur’an and ignoring the rest. This tactic is bound to fail because it can always be weakened by contradictory verses present in the Qur’an. Others, like Azizah al-Hibri,⁵⁴ argue that this verse is only another example of the Prophet’s attempt to provide the maximum protection for women. For example, not only are they to receive an income upon marriage,⁵⁵ but the Qur’an also requires that a woman’s income be used only by her. This interpretation is viewed by al-Hibri as consistent with the Prophet providing alternative methods to discipline one’s wife (such as throwing a handful of grass at her, rather than recommending that she be beaten).⁵⁶ The assumption here is that, over time, the Prophet would have gone from recommending light gestures such as throwing a handful of grass to forbidding physical abuse of women completely.⁵⁷

Even if the Qur’an does not outwardly ban polygamy, there are indications that many of the Prophet’s rules were inspired by women’s sufferings and realities of the time. The same standard should be applied to determine if the practice of polygamy is appropriate. If it is deemed

51. THE QUR’AN 61 (4:129) (M.H. Shakir trans., Tahrike Tarsile Qur’an, Inc. 1997). See also al-Hibri, *Muslim Women’s Rights*, *supra* note 12, at 58 n.113 (addresses injustice of polygamy); *id.* at 59 n.117 (addresses equity and fairness).

52. THE QUR’AN 61 (4:129) (Shakir), *supra* note 51.

53. THE QUR’AN 22 (2:228) (Shakir), *supra* note 51.

54. al-Hibri, *Muslim Women’s Rights*, *supra* note 12, at 51. See also *id.* at 51 n.75; 59 n.120; 62 n.139, n.143; 63 n.150; 64 n.155 (citing reference to Qur’an 4:34).

55. *Id.* at 46-48.

56. *Id.* at 64-65.

57. *Id.*

inappropriate, it must be based on women's desires and on the measure of injustice that is carried out against women when maintaining a polygamous system. Similarly, if it is deemed appropriate, it should be maintained according to women's wishes, desires and rules that will render justice to them. The Qur'anic language is one that is objective and inclusive of both genders. Both men and women have to follow the same rules in order to live a pious life.

One only needs to look at various Hadiths (sayings excerpted from the Sunna) to understand that the Prophet was dedicated to fairness and justice not only in theory, but in his life as well. It is reported that the Prophet did not hesitate to acknowledge the part that women's contributions played in his mission. Some women played a more crucial role in the Prophet's life than males. For example, the first person who believed in him was a woman, his first wife, Hazarat Khadija. She believed in him and defended him from disbelievers. She also consoled and reassured him when faced with rejection in the early times of his mission. All this evidence tends to show that Islam was founded on a basis of open-mindedness.

That being the case, Islamic application still has a lot of room for growth if it is to become as just as envisioned by the Prophet Muhammad. At the inception of Islam, the Prophet was preoccupied with making sure there was an organized and disciplined society. Some people even argue that the Prophet meant to restrict polygamy to orphans and to women who were most in need of protection.⁵⁸ Thus, we see here an eminent concern that everyone in society should be nurtured. However, while this concern is a noble one, we can attest that the methods of achieving its goal no longer apply. Just as the Prophet frowned on infanticide and an abusive form of polygamy at the inception of Islam, his sense of justice would not agree with the current practice of polygamy.

Since many systems, such as slavery, have now been re-evaluated and considered unjust, the practice of polygamy should be placed under the same scrutiny. This evaluation, however, must be conducted from the perspective of Muslim women who should be included in the process of reforming the laws. It is interesting to note that the system of polygamy does not originate with Islam. As Shalmat Ali explains: "it is essential to understand that Muhammad did not introduce polygamy into his legal system as is commonly and conveniently believed. He found himself amidst a system where polygamy was a common feature not only among the Arabs but the Persians and the Jews as well."⁵⁹ Even some of the most important figures of Christianity held degrading views of women and favored polygamy. According to Worsley Boden, even St. Augustine "put

58. However, the only obstacle to this interpretation is that the term orphan in Arabic can also be translated to mean "women." Thus, that line of argument is weakened.

59. DR. ZEENAT SHAUKAT ALI, *MARRIAGE AND DIVORCE IN ISLAM: AN APPRAISAL* 117 (Jaico Publishing House 1987).

polygamy and prostitution in the same category with marriage and figured them as being as necessary to a man as a sewer to his palace."⁶⁰ The position of women in all cultures was an inferior one. In pre-Islamic Arabic culture, infanticide was a popular custom. It is said that:

When a child girl was born the house became a house of mourning. The face of the father was darkened by intense sorrow. He hid himself on account of shame. The tribes of Muzir, Khaza'a and Tameem buried their daughters alive fearing that they might be sought in marriage by persons belonging to different tribes or brotherhood of lower status or that poverty overtake them. It was customary with them that when the girl child was six years' old the father would dig a pit, and order the child's mother to bathe and clothe her in beautiful raiments. He would then take her with him and push her inside the pit and bury her in it. Sometimes girls were strangled mercilessly.⁶¹

Verses 17:31, 6:152, 16:58, 59 and 47:17 of the Qur'an are direct responses to these practices. The Qur'an also addresses other issues affecting women at the time. It allows for the remarriage of widows. Prior to Islam, widows were taken as property with the inheritance left by the deceased. In addition, it creates marital laws where women are given a certain amount of respect and protocol. According to Justice Aftab Hussain, "Islam placed the woman on a high pedestal and engendered in the hearts of her parents sentiments of love, affection, mercy and sacrifice."⁶² Relative to the culture of the time, the Qur'an made great strides in attempting to come up with a system designed to prevent injustices towards women. In addition, there is evidence in the Qur'an that restricted living was seen as a way to still provide protection for women and children who were left poor and abandoned after their husband, brother, or father went to war.⁶³ Muhammad was concerned with insuring that women were not abandoned to poverty.⁶⁴ At the time, there was a shortage of men due to wars and a feeling that women needed protection. Women and orphans, especially young girls, were left without protection and Muhammad wanted to remedy the situation.⁶⁵

It is clear that Prophet Muhammad took already existing practices in his community and provided new protections for women. When discussing

60. ALI, *supra* note 59, at 116 (quoting Worsely Boden).

61. MR. JUSTICE AFTAB HUSSAIN, STATUS OF WOMEN IN ISLAM 127 (Law Publishing Company 1987).

62. *Id.*

63. AN-NA'IM, *supra* note 19, at 63, 206-13.

64. *Id.*

65. *Id.*

the situation of women, the Qur'an stresses the importance of just and equal treatment. The Prophet was concerned that women were not left destitute and treated in ill and unjust manners. In one of the most famous verses regarding women and marriage (Q.4:3) this concern is evident: "And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four; but if your fear that you will not do justice (between them), then (marry) only one"⁶⁶ This verse has served as a symbol of the Prophet's support and recommendation of polygamy. Moreover, it is seen as evidence of the Prophet's fear that some women would not be treated equally. Social concern and eagerness to find ways to remedy inequality permeate this verse. The Prophet Muhammad was concerned with the stability of family units and wanted to insure that everyone received proper care. Primarily, the Prophet was concerned with the administration of justice. For example, verse Q.4:3 limits the exercise of polygamy if it is practiced unjustly. Considering the limitation of his times, Prophet Muhammad could be seen as a pioneer in addressing human rights issues:

Muhammad introduced rights and privileges for women that other legal systems voluntarily adopted with the influx of time. He insisted on perfect equality between the sexes in the exercise of all legal powers and functions. He restrained polygamy by limiting and insisting on *Adl* (justice) not only in the form of physical requisites and domestic comforts but also in matters of respect and love, thereby giving a completely new outlook to the degraded status of women.⁶⁷

Prophet Muhammad's work in human rights should be understood in the context of the extreme circumstances that existed in his time. The marital laws are a perfect example of Muhammad's attempt to incorporate the notion of equality within the legislative system. For example, Islam is the only religion that specifically allows women to work and fend for themselves. Q.4:32 states: "And do not covet that by which Allah has made some of you excel others; men shall have the benefit of what they earn and women shall have the benefit of what they can earn"⁶⁸ These words are interpreted as permission for women to earn a living on their own,⁶⁹ and more importantly, it forbids men from appropriating women's

66. THE QUR'AN, (Shakir), *supra* note 51, at 48.

67. ALI, *supra* note 59, at 117.

68. THE QUR'AN, (Shakir), *supra* note 51, at 51.

69. al-Hibri, *Muslim Women's Rights*, *supra* note 12, at 47, 49; *see also* 47 n.51 (citing to Zaidan 'Abd al-Baqi, conceding that Muslim women are entitled to spend their own money, but advising that they consult her husband before doing so in order to maintain a harmonious relationship with him).

earnings. The desire to protect traditionally vulnerable groups also explains the Qur'an's emphasis on orphans, especially female orphans.

It is not unusual for a historical figure to be influenced by the common practices of his times. What is unusual and laudable, however, is that the Prophet Muhammad directly countered these practices and tried to elevate his community in order to embrace notions of gender equality. At the time, polygamy was in existence and women faced great injustices without any legal recourse. In the Qur'an and the Sunna, the Prophet tried to encourage a system that would insure that women would be protected and would not be left destitute and poor. At the very least, applications and interpretations of Islamic texts should maintain the work begun by the Prophet.

B. SPECIFIC EXAMPLES OF REFORMS

Many anti-polygamy groups have emerged over the past few decades. These groups have argued that polygamy is no longer applicable to the present time and should be abolished. They assert that, while polygamy might have been necessary in seventh and eighth century Arabia, it is no longer justified and creates more harm than good. Going along with that rationale, a few countries have used Ijtihad to abolish polygamy. Tunisia and Morocco are among these few. The reformers in Tunisia based their decision on the Qur'anic provision that required that co-wives be treated with complete impartiality. They reasoned that the Qur'anic verse should be treated as a legal condition to polygamy. Thus, it was decided that no man should be granted permission unless he showed adequate evidence that his wives would be treated with impartiality. The reformers declared that under modern social and economic conditions, such impartial treatment was practically impossible. In short, there was an irrefutable presumption that the essential condition for polygamy was incapable of fulfillment. Polygamy, therefore, was prohibited outright.

The abolishment of polygamy in Tunisia is a result of religious interpretation as reflected in their 1957 Law of Personal Status. Tunisia belongs to the category of Islamic countries that tried to create a compromise between abandoning classical Islamic law and adopting secular law. They did not limit themselves to their own school of thought. Instead, they sampled different schools while incorporating modern interpretations. Hence, such reforms, which were regulatory and substantive or both, might specify a variant doctrine as advocated by some other school or jurist instead of enforcing the dominant Hanafi doctrine in every case. This technique has been successful in prohibiting polygamy and restricting a husband's unfettered right to divorce. In addition, there exists no conflict of which school of thought to follow.

However, many of the reform movements are limited, and many other

countries have refused to deviate from a strict application of classical Shari'a. Thus, in general, Islamic family law is dominated by traditional jurisprudence. According to An-Na'im:

The human rights of Muslim women have been directly and continuously affected within the family by Shari'a, because its relevant aspects have remained in force under the legal systems of the vast majority of Muslim countries. This control which Shari'a exercises over the private realm of the home and family is so entrenched, and its violation of human rights so clear, that it may explain in part why some Muslim countries refuse to ratify the relevant human rights instruments or at least enter reservations on their obligations under certain human rights treaties.⁷⁰

This statement illustrates the importance of interpreting the Shari'a in a way that demonstrates its compliance with Islamic law, while providing more rights to women.

Of the 43 Muslim countries, only two have enacted full reforms of the marriage laws. These two countries are Morocco and Tunisia. There are over 21 countries with majority Muslim populations who have not enacted any reformatations.⁷¹ Other Muslim countries, such as Pakistan, have enacted codes of law that partly reform Islamic law in the country. The

70. Abdulah Ahmed An-Na'im, Dossier 14-15: *Islam and Women's Rights: A Case Study* (September 1996) available at <http://www.wluml.org/english/pubsfulltxt.shtml?cmd%5B87%5D=i-87-2629> (last visited November 6, 2006) [hereinafter An-Na'im, *A Case Study*]. An-Na'im states:

Some Muslim countries have introduced limited reforms in the family law field. These appear to be more likely to survive traditionalist and fundamentalist backlash than the Iranian ones discussed above, because of their modest nature. The 1979 amendments to the personal law of Egypt were carefully formulated to forestall any unnecessary confrontation with conservative religious elements. These amendments maintained the husband's rights of unilateral divorce and polygamy while seeking to balance those rights by some procedural and financial guarantees for the wife. In Pakistan, the Muslim Family Laws Ordinance of 1961 introduced some reforms. Among other measures, it instituted a network of Arbitration Councils to deal with divorce, polygamy and maintenance of wives. Now, the written permission of the Arbitration Council is required before a married man can take another wife.

These reforms are only small steps toward redressing human rights objections to the status of women under Shari'a, and yet they are criticized by traditionalist and fundamental groups as un-Islamic

71. See *id.* An-Na'im states:

Egypt is one of the very few Muslim countries to have ratified the *Convention on the Elimination of All Forms of Discrimination Against Women* of 1979. It entered, however, a reservation to Article 16 of the Convention which provides for the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution. The Egyptian reservation specifically stated that since these matters were governed by Shari'a, Egypt had to derogate from its obligations under the Convention.

Muslim Family Law Ordinance of 1961 in Pakistan requires a man who desires a second marriage, while already married, to obtain the written permission of an arbitration council and possibly the consent of the existing wife as well.⁷² Failure to obtain such permission would result in statutory fines, such as imprisonment of up to a year. The ordinance went so far as to consider null the husband's repudiation of his wife when done without a court's consent. While this is considered a rather progressive view relative to Islamic reform movements, it still does not go so far as to confer equal rights to both the husband and wife. In its application, the arbitration council only requires notice to the wife and the chairman of the council.

All Islamic reform should be centered around the "jurisprudential rule that 'verses in the Qur'an explain each other,' i.e. the Qur'an is an integral whole, thus the full and proper meaning of any verse cannot be understood in isolation from other verses in the Qur'an."⁷³ This means that Islamic rules must provide for the protection of women who choose to be in polygamous unions in a manner that is satisfactory to women and have their best interests as the primary goal. Unfortunately, this concern for the equality of women was not sustained after the death of the Prophet. There is now a great disparity between the ideal set by the Prophet and the actual application of polygamy. The warning against practicing polygamy unfairly is overlooked, as the system of polygamy often only serves to satisfy men's whims and sexual desires.

Potential Islamic reforms should explore the possibilities of a women-centric polygamy and should advocate for the enactment of legal safeguards for those who are practicing polygamy. A women-centric form of polygamy is a system where all the decisions are made by, and for the benefit, of the women involved. All marriage contracts should include the terms by which a male spouse might be allowed to marry one or more additional wives. In addition, all potential co-wives should negotiate among themselves the terms of the partnership without any influence or coercion from the male spouse. A women-centric form of polygamy should also grant each co-wife the unilateral right to divorce. Finally, any equitable form of polygamy should allow for the possibility of polyandry and must set up safeguards for the physical and emotional protection of all the parties involved.

72. See An-Na'im, *A Case Study*, *supra* note 70.

73. al-Hibri, *Muslim Women's Rights*, *supra* note 12, at 60; see also n.127.

V. POTENTIAL FOR COALITION-BUILDING BETWEEN MUSLIM AND NON-MUSLIM WOMEN

Islamic reform movements⁷⁴ would be strengthened by coalition-building between Muslim women in Islamic jurisdictions, Muslim women in non-Muslim states and non-Muslim women. Until now, the dialogue between Muslim and non-Muslim women has been superficial at best. This is in part due to the fact that western women have generally been quite judgmental of the Islamic way of life. When faced with the inequities experienced by Muslim women within Islam, western feminism traditionally views Islam as destructive to women and generally advocates secularism as the only way to right these inequities. However, "[I]t is important to keep in mind that most Muslim women tend to be highly religious and would not want to act in contradiction to their faith."⁷⁵ The aforementioned traditional feminist view assumes that all Muslim women would be willing to rid themselves of Islam once they are exposed to secular ethics. Furthermore, this view fails to take into account the dedication of certain Muslim women to their faith.

Promoting a solution that eradicates Islam has alienated Muslim women from non-Muslims and, over time, has increased the miscommunication between the two groups. What then is the solution? Should non-Muslim women merely tend to their own affairs and abstain from dialogue with Muslim women? Azizah al-Hibri argues that:

The majority of Muslim women who are attached to their religion will not be liberated through the use of a secular approach imposed from the outside by international bodies or from above by undemocratic governments. The only way to resolve the conflicts of these women and remove their fear of pursuing rich and fruitful lives is to build a solid Muslim feminist jurisprudential basis which clearly shows that Islam not only does not deprive them of their rights, but in fact demands these rights for them.⁷⁶

74. See An-Na'im, *Case Study*, *supra* note 70. An-Na'im states:

This proposal is timely because Muslims throughout the world are sensitive to charges that their religious law and cultural traditions permit and legitimize human rights violations; hence the efforts of contemporary Muslim authors to dispel such allegations. Governments of Muslim countries, like many other governments, formally subscribe to international human rights instruments because, in my view, they find the human rights idea an important legitimizing force both at home and abroad. Moreover, as explained earlier, many emerging women's organizations and modernist forces are now asserting and articulating their demands for justice and equality in terms of international human rights standards.

75. al-Hibri, *Islam, Law and Custom*, *supra* note 13, at 1, 3.

76. *Id.* at 3.

In this era of international hostility and suspicion towards all that is Muslim, finding means to open the dialogue between Muslim and non-Muslim women would not only be beneficial, but is necessary. Misplaced suspicion towards Muslims and fear of terrorism has relegated each side to their respective corners.

The struggle for women's rights must be fought internationally as well as nationally. Technological advances have revealed immense possibilities for an international feminist discourse. Women around the world can now transcend their geographical boundaries in search of solutions to their respective problems. However, this dialogue can only be fruitful if the cultural differences among women are acknowledged and understood. Thus, an international feminist discourse should expand beyond western standards and refrain from imposing homogeneous feminist views upon the world.

While past reform efforts are noteworthy, all Muslim states must be challenged to operate a full reform where the interests of women are completely protected and furthered. It is important to recall that many of the past reforms were enacted in the 1950s and may be in need of serious revisions. If we base ourselves on the Qur'anic premise that women have the same rights as men, then we should also accept the conclusion that women should benefit from the same growing opportunities that are offered to men through the advent of progress and changing times. Using Ijtihad, one can infer that if the Prophet had such concerns for the well-being of women and wanted to protect their interests in the sixth century, he would probably agree with the need for reforms today in the face of changing times.

The potential for international coalition building among women has been made a reality by the work of diverse grassroots activists. Azra Nomani encapsulates the immense possibilities contained in international feminist coalition building when she describes the work she and other Muslim feminists have done together:

The force of our collective effort convinced me that we have the strength to challenge the men's club that defines most of the Muslim world. It was an affirmation of the commitment that had brought me and the [eleven] other participants here from as far away as Malaysia, Mali, Nigeria, France, Canada, the United Kingdom, the United States and refugee camps in the disputed territory of Western Sahara to share stories from the trenches in the "gender jihad." We Muslim feminists view it as a struggle that taps Islamic theology, thinking and history to reclaim rights granted to women by Islam at its birth but erased by manmade rules and tribal traditions masquerading as divine law. In the

communities where we live, we have begun challenging customs that deny women rights from the mosque to the bedroom: gender segregation, mandatory veiling, forced early marriages, clitorectomies, polygamy, death for sex outside of marriage, domestic violence and strict domestic roles.⁷⁷

Muslim women's efforts at obtaining more legal rights are being heard internationally and are progressively bearing fruit. Even the business community has taken notice and companies have started to provide economic support to these grassroots women's groups.⁷⁸ Keenly aware of the importance of international alliance, these women are looking across geographical boundaries for support. For example:

[F]rom Malaysia, Zainah Anwar, executive director of the Sisters in Islam (dubbed "Satan in Islam" by conservatives) . . . [and Sisters in Islam are] calling Moroccan legal experts to Malaysia next February to educate local leaders about the progressive family reforms that Morocco passed last year. This month, Anwar and other Sisters in Islam leaders will go to England to swap strategies with [ten] Muslim women's groups.⁷⁹

Feminist activists must take advantage of this momentum and international advocacy to promote the protection of women who choose polygamy, even if that choice is contrary to the mainstream anti-polygamy sentiment.

VI. CONCLUSION

As seen in Tunisia, it is not a far-fetched conclusion to say that polygamy is no longer necessary or applicable to Islam. As evidenced in Christianity and other religions, with the evolution of time many aspects of cultural life have to change to leave room for a more suitable way of life. It used to be common for men to marry very young girls and, as it is mentioned in the Bible, people used to marry their cousins and other close members of their family. As times have changed, these practices have grown to be viewed as archaic and inappropriate. Prophet Muhammad was aware of his own limitations and wanted individuals to use reason in making decisions about life and changing circumstances. It is evident in his emphasis on the use of judgment that Prophet Muhammad would not have wanted a close-minded interpretation of Islamic law. Similarly,

77. Nomani, *supra* note 28.

78. *Id.* (reporting that the Sisters in Islam's newsletter "is being funded by the successful multinational cosmetics company the Body Shop").

79. Nomani, *supra* note 28.

Prophet Muhammad would have wanted his methods of reasoning to be used to address the needs of those placed in unjust situations, such as those experienced by women in non-women-centric polygamous unions.

Regardless of one's personal view of polygamy, there is a need for the empowerment and protection of women within that system. Reforming Islamic marriage laws has to go further than requiring the man to ask permission before taking a second wife, and should go further than enacting laws that ask for written notice of any repudiation of women. If polygamy is to exist, it should be done in a setting where women are consistently empowered in their daily lives and given full access to all aspects of the culture. Women should be able to decide for themselves whether polygamy is appropriate for them and not feel that they have to accept oppressive patriarchal terms.